THE HONORABLE BENJAMIN H. SETTLE

UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF WASHINGTON
AT TACOMA

SANDI WILSON and SYNTHIA LISI, Individually and on Behalf of All Others Similarly Situated, Plaintiffs, v. VENTURE FINANCIAL GROUP, INC., KEN F. PARSONS, SR., JAMES F. ARNESON, KEITH W. BREWE, LOWELL E. BRIDGES, LINDA BUCKNER, PATRICK L. MARTIN, LARRY J. SCHORNO, JEWELL C. MANSPEAKER, A. RICHARD PANOWICZ, CATHERINE J. MOSBY, SANDRA L. SAGER, and PATRICIA A. GRAVES, Defendants.	No. 09-cv-05768 BHS **PLAINTIFFS' MOTION AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PRELIMINARY APPROVAL OF THE PROPOSED SETTLEMENT** **Noted for: January 7, 2011**

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I. MOTION

Plaintiffs Sandra Wilson and Synthia Lisi ("Plaintiffs" or "Named Plaintiffs") respectfully move the Court for an Order: (1) granting preliminary approval of the proposed settlement ("Settlement"); (2) preliminarily certifying a settlement class; (3) approving the form and manner of notice of the Settlement to the certified Class ("Class Notice"); and (4) setting a date for a Fairness Hearing.

II. INTRODUCTION

The proposed Settlement[1], consisting of a cash payment of $750,000, provides substantial benefits to members of the Class and resolves all claims asserted by Plaintiffs against the Settling Defendants.[2] The Settlement is fair, reasonable, and adequate under the governing standards for evaluating class action settlements in this Circuit. *See, e.g., Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998). Moreover, the proposed Notices satisfy the requirements of due process and is akin to Notices approved in similar cases. As set forth below, all prerequisites for preliminary approval of the Settlement have been met and Plaintiffs respectfully request that their motion be granted.[3]

III. PROCEDURAL AND FACTUAL BACKGROUND

A. Description of the Litigation

The Action was filed on behalf of the participants and beneficiaries of the Venture Financial Group, Inc. Employee Stock Ownership Plan ("ESOP") and the Venture Financial

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[1] Capitalized terms in this motion and accompanying memorandum have the meaning assigned to them in the Settlement Agreement.

[2] A copy of the Settlement Agreement is attached as Exhibit A to the Declaration of Andrew Volk in Support of Motion for Preliminary Approval of Proposed Settlement ("Volk Declaration"). Capitalized terms not otherwise defined in this memorandum have the same meanings ascribed to them in the Settlement Agreement.

[3] Attached to the Settlement Agreement as Exhibit 1 is the [Proposed] Findings and Order Preliminarily Approving Proposed Settlement, Preliminarily Certifying Settlement Class, Approving Form and Dissemination of Notices, and Setting Date for Hearing on Final Approval ("Preliminary Approval Order").

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Group, Inc. Employee Stock Ownership Plan with 401(k) provisions ("KSOP") (collectively "the Plans") on December 16, 2009. *See* Dkt. #1.

All Defendants moved to dismiss the Named Plaintiffs' complaint on March 15, 2010. *See* Dkt. #28. Plaintiffs filed their reply brief on April 5, 2010. *See* Dkt. #34.

On May 18, 2010, the Court issued an Order granting in part and denying in part Defendants' motion to dismiss (the "Order"). *See Wilson v. Venture Fin. Group, Inc.*, 2010 U.S. Dist. Lexis 49736 (W.D. Wash. May 18, 2010) (Dkt. #44). In its Order, the court permitted Plaintiffs to proceed to the discovery phase on their claim that "it was a breach of the duties of loyalty and prudence to continue holding and offering the Bank stock in the face of the known financial challenges the Bank was allegedly facing" (the "purchaser" claim). *Id.* at *22. However, the court granted Defendants' motion to dismiss Plaintiffs' claims for relief with respect to the VFGI stock held in the Plans at the start of the Class Period (the "holder" claim).

On June 1, 2010, Plaintiffs moved the Court to reconsider the Order. *See* Dkt. #55. Defendants filed their response to Plaintiffs' motion for reconsideration on June 9, 2010. *See* Dkt. #62. On June 15, 2010, the Court issued an order denying Plaintiffs' motion for reconsideration. *See* Dkt. #66.

B. Investigation of Claims and Discovery

The Action seeks to recover losses under ERISA §§ 409 and 502(a)(2) suffered by the Plans as a result of alleged breaches of fiduciary duty. The Named Plaintiffs alleged five causes of action in the Complaint, but voluntarily dismissed Count V. Count I alleged that certain Defendants failed to prudently and loyally manage the Plans and their assets. Count II alleged that certain Defendants failed to monitor the fiduciaries and ensure the fiduciaries performed their fiduciary obligations. Count III alleged that certain Defendants failed to provide complete and accurate information to the KSOP's participants and beneficiaries. Count IV alleged that all Defendants breached their co-fiduciary duties.

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Class Counsel has thoroughly investigated Plaintiffs' claims and the allegations set forth in the Complaint. Investigative efforts have included: (1) Serving third-party subpoenas to the Federal Deposit Insurance Corporation ("FDIC"), Washington Department of Financial Institutions ("WDFI"), Principal Financial Group (the Plans' record-keeper), Moss Adams LLP (the Plans' auditor), Howe Barnes Hoefer & Arnett (the firm that appraised VFGI stock), Chang Ruthenberg & Long (VFGI's ERISA counsel), and First Citizens Bank & Trust (the successor to Venture Bank); (2) Serving requests for production and interrogatories to Defendants; (3) Inspecting, reviewing, and analyzing document productions from Defendants, the FDIC, Principal Financial Group, Moss Adams, Howe Barnes Hoefer & Arnett, First Citizen Bank & Trust; (4) Discovering, reviewing, and analyzing relevant public documents from the FDIC, Office of the Inspector General, and the Securities and Exchange Commission; (5) Interviewing Plaintiffs and analyzing documents collected from Plaintiffs; and (6) Researching the applicable law with respect to the claims asserted and the potential defenses thereto.

In addition to the above efforts, the Parties' discovery included the following:

1. Rule 26(f) Conference

The Parties held a Fed. R. Civ. P. 26(f) conference on March 12, 2010. The conference was attended telephonically by Class Counsel and Defendants' Counsel. On March 22, 2010, the Parties jointly filed a status report with the Court and provided a detailed discovery plan and proposed schedule for the case. *See* Dkt. #31.

2. Initial Disclosures

The Parties served their Initial Disclosures as required by Fed. R. Civ. P. 26(a) on April 2, 2010.

3. The Parties' Written Discovery

The Plaintiffs served their First Set of Interrogatories and Requests for Production on June 25, 2010 ("First Requests"). Defendants served written responses and documents in response to the First Requests and, after the parties met and conferred, Defendants produced

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additional documents. Defendants served their First Set of Requests for Production of Documents on September 27, 2010. Plaintiffs served their Second Set of Interrogatories and Requests for Production of Documents on September 28, 2010.

4. Settlement Negotiations

On September 22, 2010, the Parties participated in a mediation governed by the Honorable Terry Lukens (Ret.). The Parties were unable to resolve the dispute on that date, but they continued to negotiate in the days that followed. Given the fact that Venture Financial Group, Inc. was put into receivership on September 11, 2009, Class Counsel was keenly aware of the limited ability of Plaintiffs and the proposed Class to fully recover the Plans' losses, and the risk of depletion of the applicable insurance policy. Accordingly, following a detailed review of the available insurance, as well as an analysis of the merits of the litigation, Class Counsel agreed to settle the Action for $750,000 in November of 2010; the Parties then entered into a Memorandum of Understanding setting forth the essential terms of the settlement. The Parties executed the Settlement Agreement defining the terms and provisions of the Settlement on December 22, 2010.

In sum, the Settlement Agreement was the result of contentious arm's-length negotiations. This process was in all respects thorough, adversarial, and professional.

C. The Terms of the Settlement Agreement

The complete terms and conditions of the proposed Settlement are set forth in Exhibit A to the Volk Declaration. The following is a summary of the principal terms of the Agreement:

1. Class Notice.

A proposed Preliminary Approval Order is attached to the Settlement Agreement as Exhibit 1. The Preliminary Approval Order provides for the following notices:

(a) A mailed Class Notice to be mailed to the last known address of Settlement Class Members; and

(b) Internet posting of the Class Notice and related documents on Class Counsel's website, www.hbsslaw.com.

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2. Plan of Allocation.

The Plan of Allocation is the plan or formula for allocation of the Net Settlement Amount, subject to approval by this Court, whereby the Net Settlement Amount will be distributed for the benefit of the Settlement Class. A copy of the proposed Plan of Allocation is attached to the Volk Declaration as Exhibit B.

In their motion for Final Approval of the Settlement, Plaintiffs will request that the Court appoint Mr. Nicholas L. Saakvitne as the Independent Fiduciary for purposes of effectuating the distribution of the Net Settlement Amount consistent with the Plan of Allocation. Mr. Saakvitne's statement of credentials is attached to the Volk Declaration as Exhibit C.

3. Releasees.

The Settling Defendants and their agents, Insurers, co-insurers, attorneys, accountants, actuaries, advisors, auditors, banks, professional advisors, Representatives, partners, and co-venturers, spouses, marital communities as well as the predecessors, successors and assigns of all such persons or entities excluding Defendant Ken F. Parsons, Sr., are Releasees as defined in the Settlement Agreement.

4. The Settlement Amount.

The Parties agreed to settle this Action for the sum of $750,000 in cash.

5. The Settlement Class.

The Settlement Class consists of a non-opt out class consisting of all persons who were participants in or beneficiaries of the Plans at any time between January 1, 2008 and September 11, 2009 and whose individual account in either or both Plans included investments in Company Stock.

6. Released Claims.

Section 5.2 of the Settlement Agreement defines the Released Claims, which include, in general terms, all claims raised or that could have been raised in this Action that pertain to the allegations of the Complaint.

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D. Reasons for the Settlement.

Plaintiffs have entered into this proposed Settlement with an understanding of the strengths and weaknesses of their claims. This understanding is based on: (1) the motion practice undertaken by the parties; (2) the investigation, research, and discovery as outlined above; (3) the likelihood that Plaintiffs would prevail on summary judgment; (4) the likelihood that Plaintiffs would prevail at trial; (5) the range of possible recovery; (6) the substantial complexity, expense, and duration of litigation necessary to prosecute this action through trial, post-trial motions, and likely appeals, and the significant uncertainties in predicting the outcome of this complex litigation; and (7) the significant risk that available insurance would be depleted over the course of the litigation, and Plaintiffs would be unable to collect on a substantial judgment in the event they prevailed in the litigation. Having undertaken this analysis, Class Counsel and Plaintiffs have concluded that the Settlement is fair, reasonable, and adequate, and should be presented to the Court for approval.

IV. PROPOSED SCHEDULE

As laid out in the Preliminary Approval Order, the Settling Parties have agreed to the following schedule of events, the dates of which will be determined after the Court enters the Preliminary Approval Order and sets a Fairness Hearing date:

Event	Time for Compliance
Deadline for Mailing of Class Notice and posting Settlement Agreement and Notice on www.hbsslaw.com	30 days after entry of Preliminary Approval Order

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Deadline for filing Plaintiffs' motion for final approval and for attorneys' fees and costs	35 days prior to the proposed Fairness Hearing
Deadline for interested parties to comment upon or object to the proposed Settlement	15 days prior to the proposed Fairness Hearing
Deadline for filing Plaintiffs' reply in support of motions for final approval and for attorneys' fees and costs	5 days prior to the proposed Fairness Hearing
Proposed Fairness Hearing in District Court[4]	March 25, 2011, or as soon thereafter as convenient for the Court

V. ARGUMENT

A. The Settlement Agreement Meets the Judicial Standards for Preliminary Approval Under Ninth Circuit Law and Rule 23.

The Ninth Circuit is firmly "committed to the rule that the law favors and encourages compromise settlements." *Ahern v. Cent. Pac. Freight Lines*, 846 F.2d 47, 48 (9th Cir. 1988) (citing *United States v. McInnes*, 556 F.2d 436, 441 (9th Cir. 1977)). Rule 23 of the Federal Rules of Civil Procedure governs settlements of class action lawsuits. Although the procedure for approval of a class action settlement is not specifically delineated in Rule 23, a two-step procedure is set forth and approved in the Federal Judicial Center's Manual for Complex Litigation § 21.632, at 320-21 (4th ed. 2004), and is universally followed by federal courts. *See, e.g., In re Phenylpropanolamine (PPA) Prods. Liab. Litig.*, 227 F.R.D. 553, 556 (W.D. Wash. 2004); *Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 525 (C.D. Cal. 2004). First, the court must determine "whether a proposed class action settlement deserves preliminary approval." *Nat'l Rural Telecomms. Coop.*, 221 F.R.D. at 525 (citing Manual for Complex

[4] Pursuant to the Class Action Fairness Act at 28 U.S.C. § 1715, the date of the Fairness Hearing must be at least 90 days after notices are served on the appropriate state and federal officials. Notice under that Act will be provided by December 23, 2010.

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Litigation, § 30.31, at 236-37 (3d ed. 1995)). Second, following notification of the class members, the court must determine whether final approval is warranted. *Id.*

During the first stage, the parties submit the settlement to the court for preliminary approval and the court makes a preliminary fairness evaluation. Manual for Complex Litigation § 21.632, at 320-21. In granting preliminary approval, the court determines whether the proposed settlement is "fundamentally fair, adequate, and reasonable." *Hanlon*, 150 F.3d at 1026. The court does "not decide the merits of the case or resolve unsettled legal questions." *Carson v. Am. Brands, Inc.*, 450 U.S. 79, 88 n.14 (1981); *see also Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 625 (9th Cir. 1982). Rather, the settlement as a whole must be examined for overall fairness, adequacy, and reasonableness, standing or falling in its entirety. *Hanlon*, 150 F.3d at 1026.

A settlement is presumptively fair if: "(1) the negotiations occurred at arm's length; (2) there was sufficient discovery; (3) the proponents of the settlement are experienced in similar litigation; and (4) only a small fraction of the class object[s]." *Rodriguez v. West Publ'g Corp.*, 2007 U.S. Dist. LEXIS 74849, at *32-33 (C.D. Cal. Aug. 10, 2007) (citing Alba Conte & Herbert B. Newberg, Newberg on Class Actions § 11.41 (4th ed. 2002)), *rev'd on other grounds,* 563 F.3d 948 (9th Cir. 2009).

The Settlement easily satisfies the first three fairness factors.[5] Negotiations occurred at arm's length. The parties also engaged in significant discovery, allowing Plaintiffs to understand the factual and legal issues of the case. And finally, Class Counsel has extensive experience litigating claims of this same type and, thus, is well informed of the potential strengths and weaknesses of the case. As a result, the proposed Settlement should be afforded a presumption of fairness.

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[5] The fourth factor will become relevant after the Class has been notified of the Settlement following preliminary approval.

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Further, the Settlement satisfies the eight factors articulated by the Ninth Circuit to determine whether a settlement is fair, adequate, and reasonable:

(1) strength of the plaintiff's case;
(2) risk, expense, complexity, and likely duration of further litigation;
(3) risk of maintaining class action status throughout the trial;
(4) amount offered in settlement;
(5) extent of discovery completed and stage of the proceedings;
(6) experience and views of counsel;
(7) presence of a governmental participant; and
(8) reaction of the Class Members to the proposed settlement.

Hanlon, 150 F.3d at 1026.

Consideration of the above criteria demonstrates that the proposed Settlement is well within the possible range for approval. As such, the proposed Settlement should be approved.

1. The Strength of Plaintiffs' Case Favors Approval of the Proposed Settlement.

When evaluating a settlement for preliminary approval, courts may weigh plaintiff's case against the amount offered in settlement, but should not consider the strength of plaintiff's case on the merits. *Nat'l Rural Telecomms. Coop.*, 221 F.R.D. at 527 (citing 5 Moore Federal Practice, § 23.85(2)(e) (Matthew Bender 3d ed.)). As evidenced by the vigor with which Class Counsel has prosecuted this action and the amount of time expended toward that end, Class Counsel believes strongly in the merits of this case and the claims of the Complaint. Discovery conducted by Plaintiffs, together with ample public information, including media reports and federal investigations, in Plaintiffs' view, support Plaintiffs' core allegation that Company stock became an imprudent investment for the Plans during the Class Period. Again, in Plaintiffs' view, this is because, during the Class Period, VFGI engaged in conduct that imperiled the Company, including: (1) excessive loan concentrations in high-risk real estate acquisition, development, and construction ("ADC") loans; (2) investment in high-risk Collateralized Debt Obligations that the Company failed to adequately evaluate or properly analyze for impairment; (3) inadequate liquidity due to the depreciation of the Company's securities and loan portfolios; (4) unsatisfactory earnings ultimately causing the Company to be sorely undercapitalized in

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relation to its substantial risk profile; (5) failure to implement and maintain risk management control processes; (6) substantial investments in the stock of Fannie Mae and Freddie Mac long after it was prudent to maintain such investments; and (7) mismanagement that pursued an aggressive growth strategy without prudent diversification, appropriate risk management systems, sustainable funding sources, and adequate capital support.

Nonetheless, Plaintiffs also recognize the risks of continued litigation and an adverse outcome. Plaintiffs readily acknowledge that many of the complex factual and legal issues involved in this action are contested, and both sides have proffered evidence to support their competing views of the case. Courts have come to different conclusions regarding the circumstances under which Plan fiduciaries must act to bar further purchases of company stock in ERISA Plans; a number of cases have been dismissed at the summary judgment stage on this basis. Thus, while Plaintiffs and Class Counsel believe this is a strong case for Plaintiffs, the outcome of continued litigation remains uncertain. Moreover, as a result of this Court's Order on Defendants' Motion to Dismiss, Plaintiffs and the Class are unable to pursue their "holder" claims for stock held in the Plans of the Class Period unless they were to try the remaining claims to judgment and then prevail on an appeal from this Court's Order—a lengthy and uncertain process to say the least. Accordingly, the overall strength of the case and the substantial recovery obtained as a result of its strength supports preliminary approval of the proposed Settlement.

B. The Risk, Expense, Complexity, and Likely Duration of Further Litigation Weigh in Favor of Approval.

"[U]nless the settlement is clearly inadequate, its acceptance and approval are preferable to lengthy and expensive litigation with uncertain results." *Nat'l Rural Telecomms. Coop.*, 221 F.R.D. at 526 (citing Newberg on Class Actions, § 11:50 at 155). Courts favor settlement, as it preserves resources by avoiding protracted litigation and the likely subsequent appeals. *Id.* at 527.

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As indicated above, litigation of this case poses risks for both Plaintiffs and Defendants. Although Class Counsel believes strongly in the merits of this case, Class Counsel is cognizant of the risk that continued litigation could end in non-recovery. Moreover, Defendants have denied and vigorously defended against the allegations made by Plaintiffs and are expected to continue to do so should this action proceed through trial.

In addition to the risks presented by continued litigation, proceeding through trial and the certain subsequent appeals would undoubtedly require a significant undertaking by both parties. This case presents many complex legal and factual issues in a rapidly developing area of law. To address the complexities and nuances of this case adequately, significant expenditures of time and money would be required. Class Counsel and this Court have estimated that in addition to substantial preparation time and expense, a trial would take approximately ten court days.

Given the nature of this case, a judgment at trial would likely be appealed by the losing party; indeed, win or lose on their “purchaser” claim, Plaintiffs would be forced to appeal from the dismissal of their “holder” claims in order to obtain any substantial recovery in this case. As a result, continued litigation would risk delaying the Class’s potential recovery for years, further reducing its value. Moreover, the insurance coverage that would fund Plaintiffs’ recovery is limited to a wasting policy of approximately $3 million. Thus, the monies available to remedy Plaintiffs’ allegations would likely be entirely depleted by the time a final resolution was reached.

The Settlement cuts short the additional months of contested discovery, and eliminates the time and expense of the substantial motion practice that would likely occur going forward in this case. Thus, the Settlement conserves judicial resources and reduces the expense associated with continued litigation. As a result, this factor weighs in favor of preliminary approval of the proposed Settlement.

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1. The Risk of Maintaining Class Action Status Throughout the Trial Weighs in Favor of Approval.

Though Defendants may have a contrary view, Plaintiffs do not accord this factor much weight in the context of this case. As discussed below in Section VI, Plaintiffs consider ERISA class actions of this type a "paradigmatic example" of a Rule 23(b)(1) class because they constitute claims brought on behalf of an ERISA-governed plan under ERISA § 502(a)(2) and are, therefore, derivative in nature. *See In re Schering Plough Corp. ERISA Litig*, 589 F.3d 585, 604 (3d Cir. 2009) (collecting cases).

2. The Amount Offered in Settlement Weighs in Favor of Approval.

A proposed settlement should be viewed as a whole rather than in individual pieces. *Officers for Justice*, 688 F.2d at 628. It "may be acceptable even though it amounts to only a fraction of the potential recovery that might be available to the class members at trial." *Nat'l Rural Telecomms. Coop.*, 221 F.R.D. at 527. Moreover, a settlement should not be judged against a "speculative measure" of what could have been attained in negotiation. *Linney v. Cellular Alaska P'ship*, 151 F.3d 1234, 1242 (9th Cir. 1998).

Here, the Court has already dismissed Plaintiffs' "holder" claims. Moreover, it is possible that Defendants could prevail on one or more of their legal or factual arguments to defeat liability entirely or drastically reduce Plaintiffs' damages with respect to their remaining "purchaser" claims. While Plaintiffs are confident of the strength of the purchaser claims asserted here, they recognize that this possibility cannot be discounted.

Assuming liability can be established, several variables would be at work in fixing the actual amount of recoverable damages. Key among these variables are (1) the legal framework for the measure of damages, and (2) the determination of when allowing the acquisition of VFGI stock constituted breaches of fiduciary duty. Plaintiffs anticipate that these matters would be hotly contested in the absence of a settlement, and the Court's ultimate determinations would impact greatly the recoverable damages.

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If the case were to go forward without a settlement, Plaintiffs would argue for a measure of damages that compares the results of the investment in Company stock during the Class Period to the results that would have been realized if the Plans' investments in Company stock had been invested in the most favorable investment alternative available under the Plans. Plaintiffs believe that this approach is consistent with the case law. *See Donovan v. Bierwirth*, 754 F.2d 1049, 1056 (2d Cir. 1985) (explaining that "[o]ne appropriate remedy in cases of breach of fiduciary duty is the restoration of the trust beneficiaries to the position they would have occupied but for the breach of trust") (citing Restatement (Second) of Trusts § 205(c) (1959)); *Vaughn v. Bay Envtl. Mgmt., Inc.*, 544 F.3d 1008, 1012 (9th Cir. 2008) (same).

Undoubtedly, Defendants would, in addition to disputing liability for any loss suffered by the Plans, present legal and factual arguments for a much lower damages amount even if they are found to be liable. For example, Defendants would likely argue that it is inappropriate to compare the Company stock investment results to what would have been realized under the most favorable investment alternative for the Plans.

In the Action's present posture, only Plaintiffs' "purchaser" claims remain. Plaintiffs have estimated that the Settlement Class lost approximately $1.6 million in the value of shares purchased for the Plans during the Class Period.[6] Thus, Plaintiffs' maximum "purchaser" damages, in the most favorable circumstances, are roughly $1.6 million.

But Defendants would argue that it was after January 1, 2008, if ever, that their conduct at any point constituted a breach of fiduciary duty. As the Class period passes and the breach date becomes later in time, Plaintiffs' damages decrease.[7] If the breach date were found to be

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[6] While the Plans' records show that 160,000 shares were purchased for the Plans at $13/share in August 2008 and 936 shares were purchased for the KSOP at $14/share in June 2008 (for a total of roughly $2.1 million), records also suggest that approximately $500,000 worth of that stock was purchased for Defendants. *See* Volk Declaration, ¶ 20.

[7] At the start of the class period, VFGI stock was valued at $18/share. In June 2008, the stock was re-valued at $14/share. Then, effective October 2008, VFGI was valued at $5/share. By the end of 2008, the stock was valued at just 25 cents per share. *See* Volk Declaration, ¶ 21.

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not January 1, 2008, but, for example, September 6, 2008 (the date when Fannie Mae and Freddie Mac were placed in conservatorship), damages would be virtually non-existent, as virtually no shares were purchased for the Plans after that date.

Plaintiffs also note that courts are not of one mind as to what participants must show to meet their burden in establishing the breach date. Some courts posit that the company at issue must be facing an "imminent collapse," whereas others believe something less is required. Indeed, Plaintiffs view different panels within the Ninth Circuit as disagreeing on this point. *Compare In re Syncor ERISA Litig.*, 516 F.3d 1095, 1102 (9th Cir. 2008) (holding that a "myriad of circumstances" can require fiduciaries to divest company stock under ERISA's "prudent man" standard) *with Quan v. Computer Sciences Corp.*, 623 F.3d 870, 882 (9th Cir. 2010) (requiring plaintiffs to show either that "the company's viability as an ongoing concern" is threatened *or* there was "a precipitous decline in the employer's stock … combined with evidence that the company is on the brink of collapse or is undergoing serious mismanagement"). However put and whatever the standard, the reality is that Plaintiffs' likelihood of success increases as the Class Period passes. That is, the closer the date gets to September 11, 2009 when regulators closed VFGI, the greater the chances the Court would adopt that date as the breach date in this case. But as the date become later in time, the damages of the Class also decrease.

Given the wide range of potential damages outcomes at trial of the "purchaser" claims, as well as the possibility of summary judgment or a judgment in favor of Defendants, and the necessity of prevailing on appeal in order to even pursue the "holder" claims, the Settlement provides a substantial recovery well in excess of the range that courts traditionally have found to be fair and adequate. *Officers for Justice*, 688 F.2d at 624 ("the very essence of a settlement is compromise, a yielding of absolutes and an abandoning of highest hopes") (citations and internal quotations omitted)). Accordingly, the likelihood of success on the merits, weighed against the potential recovery, and the depleting resources available to remedy Plaintiffs' legal challenges, supports approval of the Settlement.

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3. The Extent of Discovery Completed and the Stage of the Proceedings Weigh in Favor of Approval.

The extent of discovery conducted helps to determine the parties' grasp of the strengths and weaknesses of the case. *Nat'l Rural Telecomms. Coop.*, 221 F.R.D. at 527 (citing Manual for Complex Litigation § 30.42 (3d ed. 1995)). Preliminary approval of a settlement is more likely if the settlement was reached after careful investigation and consideration of the "'legal and factual issues surrounding the case.'" *Id.* (quoting 5 Moore's Federal Practice, § 23.85(2)(e) (Matthew Bender 3d ed.)).

Class Counsel have undertaken extensive discovery in this action. As described previously, Plaintiffs propounded numerous Requests for Production and Interrogatories to Defendants, and served multiple third parties with subpoenas for additional documents. Moreover, Plaintiffs have obtained considerable public documents and information from other government audits of VFGI. Class Counsel received and reviewed roughly 150,000 pages.

Based on this formal and informal discovery, Class Counsel has in-depth knowledge of the factual and legal issues of this case. Although much remains to be done to prepare for trial, Plaintiffs and Class Counsel are fully aware of the strength of the claims and potential risks, and believe without hesitation that the Settlement is fair, reasonable, adequate, and in the best interest of the Plans and the Class. Thus, the extent of discovery conducted weighs in favor of both preliminary and final approval of the Settlement.

4. The Experience and View of Counsel Weigh in Favor of Approval.

"Great weight is accorded to the recommendation of counsel, who are most closely acquainted with the facts of the underlying litigation." *Nat'l Rural Telecomms. Coop.*, 221 F.R.D. at 528 (citing *In re PaineWebber Ltd. P'ships Litig.*, 171 F.R.D. 104, 125 (S.D.N.Y. 1997)). Thus, in the absence of fraud or collusion during negotiation, deference should be afforded to the judgment of counsel. *Id.* at 528 (citing *Cotton v. Hinton*, 559 F.2d 1326, 1330 (5th Cir. 1977)).

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Class Counsel has extensive experience in handling ERISA class action cases and other complex litigation. *See* Volk Declaration, ¶¶ 23-24. Based on Class Counsel's experience and the specific facts and circumstances of this particular case, Class Counsel has concluded that the Settlement is fair, reasonable, and adequate. This factor supports preliminary approval of the proposed Settlement.

5. The Presence of a Governmental Participant

In this case, the Government is not a party. Consequently, this factor is not applicable.

6. The Reaction of Class Members to the Proposed Settlement

Plaintiffs support the proposed Settlement. Nonetheless, full discussion of this factor cannot occur until after Class Notice is issued and the Class as a whole has the opportunity to evaluate the Settlement. As such, Plaintiffs suggest that evaluation of this factor occur at the final approval stage of the Settlement.

C. The Proposed Form of Notice to Class Members Satisfies Rule 23 and Due Process Requirements.

Following preliminary approval of the terms of the Settlement, the Class must be notified of the proposed settlement. Rule 23 provides that "[t]he court must direct notice in a reasonable manner to all class members who would be bound by the [proposed settlement]." Fed. R. Civ. P. 23(e)(1).

To satisfy due process, notice to the Class must be "reasonably calculated under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950); *see also Marshall v. Holiday Magic, Inc.*, 550 F.2d 1173, 1177 (9th Cir. 1977) (finding that due process requires notice to "present a fair recital of the subject matter and proposed terms and give[] an opportunity to be heard to all class members"). More specifically, notice is proper if it provides:

> (a) the material terms of the proposed settlement; (b) disclosure of any special benefit to the class representatives; (c) disclosure of the

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> attorneys' fees provisions; (d) the time and place of the final approval hearing and the method for objecting to the settlement; (e) an explanation regarding the procedures for allocating and distributing the settlement funds; and (f) the address and phone number of class counsel and the procedures for making inquiries.

Rodriguez, 2007 U.S. Dist. LEXIS 74849, at *22.

Here, the proposed form of Class Notice (*see* Exhibit 1 to the Settlement) describes in plain English the terms and operation of the Settlement Agreement, the considerations that caused Plaintiffs and Class Counsel to conclude that the Settlement is fair and adequate, the maximum counsel fees and class representative service awards that may be sought, the procedure for objecting to the Settlement, and the date and place of the Fairness Hearing. *See* Newberg on Class Actions § 8.32. With the Court's approval, the Class Notice will be mailed to Class Members no later than 30 days after entry of the Preliminary Approval Order. In addition, an Internet Notice will make information about the Settlement available at www.hbsslaw.com.

These proposed forms of Notice will fairly apprise Class members of the Settlement and their options, as well as fully satisfy due process requirements. *See Silber v. Mabon*, 18 F.3d 1449, 1452-54 (9th Cir. 1994) (approving notice by first class mail as the "best notice practicable"); *Mendoza v. Tucson Sch. Dist. No. 1*, 623 F.2d 1338, 1352 (9th Cir. 1980) (stating that notice is satisfactory if it "generally describes the terms of the settlement in sufficient detail to alert those with adverse viewpoints to investigate and to come forward and be heard").

VI. CLASS CERTIFICATION OF PLAINTIFFS' CLAIMS IS APPROPRIATE

Plaintiffs respectfully request that the Court make appropriate findings and certify the following Class, for purposes of settlement only:

> All persons who were participants in or beneficiaries of either or both of the Plans at any time between January 1, 2008 and September 11, 2009, and whose individual account in either or both Plans included investment in Company Stock. Defendants and their heirs, Successors-in-Interest, or assigns, to the extent such persons acquire an interest held by Defendants, are excluded from the Settlement Class.

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As described in detail below, Plaintiffs believe the proposed Class meets all four prerequisites of Rule 23(a) necessary to class certification. Rule 23(b)(1) is also satisfied, making this Class appropriate for class certification.

Under *Amchem Prods. v. Windsor,* 521 U.S. 591, 620 (1997), a court faced with a request for a settlement-only class like this one need not inquire whether the case would present intractable problems of trial management, but the other requirements under Rule 23 must still be satisfied. Plaintiffs assert that they and the proposed Class have satisfied all of the Rule 23 requirements, making class certification appropriate.

A. The Proposed Class Meets the Requirements of Rule 23(a)

1. Numerosity

To warrant certification under Rule 23(a)(1), a proposed class must be so numerous that joinder of all class members is impracticable. Fed. R. Civ. P. 23(a)(1). Plaintiffs need not show that the number of class members is so large that it would be impossible to join every class member, only that it is impracticable. *Harris v. Palm Springs Alpine Estates, Inc.*, 329 F.2d 909, 913-14 (9th Cir. 1964). Here the Class satisfies the numerosity requirement because it has hundreds of members and it is plainly impracticable to join all of them. *See* Complaint ¶ 469.

2. Commonality

Under Rule 23(a)(2), Plaintiffs must show that "there are questions of law or fact common to the class." The Ninth Circuit has referred to this requirement as "less rigorous" than the predominance requirement of Rule 23(b)(3). *See Hanlon*, 150 F.3d at 1019-20 (emphasizing the "minimal requirements" and "permissive" interpretation of Rule 23(a)(2)); *see also Parra v. Bashas', Inc.*, 536 F.3d 975, 978-79 (9th Cir. 2008). Plaintiffs may satisfy the commonality requirement by demonstrating the existence of either a common legal issue with divergent factual predicates or a common nucleus of facts with divergent legal remedies. *Hanlon*, 150 F.3d at 1019; *Staton v. Boeing Co.*, 327 F.3d 938, 953 (9th Cir. 2003).

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In ERISA breach of fiduciary duty cases such as this one, courts have found that common questions of law and fact exist such that Rule 23(a)(2) is satisfied. *See, e.g.*, *In re Syncor ERISA Litig*., 227 F.R.D. 338, 344 (C.D. Cal. 2005) (plaintiffs satisfied commonality where the court found that "their possession of Syncor stock and the Defendants' alleged breaches of duty to the Plan" presented questions of law and fact common to all prospective class members). Indeed, this case presents multiple common questions of law and fact, including:

(1) whether Defendants owed fiduciary duties to the Plans and its participants;
(2) whether Defendants breached their fiduciary duties to the Plans and its participants;
(3) the measure and aggregate amount of losses sustained by the Plans; and
(4) the proper remedy for the Plans' losses.

For settlement purposes, these common issues of law and fact satisfy Rule 23(a)(2).

3. Typicality

Under Rule 23(a)(3), Plaintiffs' claims must be "typical" of those of the Class. The analysis focuses on the similarities between the legal theories of the proposed class representatives and the legal theories of the Class Members who they seek to represent. *Hanlon*, 150 F.3d at 1020; *Staton*, 327 F.3d at 957. Because both commonality and typicality focus on the similarity of the claims, the two requirements "tend to merge." *Gen. Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147, 157 n.13 (1982). Here, Plaintiffs' claims satisfy the typicality requirement for settlement purposes because their claims are substantially identical to the claims of absent Class Members – the claims rise and fall under ERISA's fiduciary duty provisions. Indeed, Plaintiffs' complaint does not characterize Plaintiffs' claims as individual claims in the first place but rather seeks relief under ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2), on behalf of the Plans as a whole, not for Plaintiffs as individual participants. *LaRue v. DeWolff, Boberg & Assoc., Inc*., 552 U.S. 248, 128 S. Ct. 1020, 1024 (2008) (quoting *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 140 (1985)); *accord id*. at 1028 (Thomas, J., concurring) ("The plain text of § 409(a), which uses the term 'plan' five times, leaves no doubt that § 502(a)(2) authorizes recovery only for the plan.").

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4. Adequacy

The proposed class representatives have and will continue to "fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). The adequacy requirement has two prongs: "(1) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" *Hanlon*, 150 F.3d at 1020. The law governing the adequacy of representatives is well settled: "[O]nly a conflict that goes to the very subject matter of the litigation will defeat a party's claim of representative status." 7A Wright, Miller & Kane, *Federal Practice and Procedure*, § 1768 at 326-27 (2009).

The settlement interests of the Plaintiffs are aligned with, not antagonistic to, the interests of the proposed Class. Plaintiffs have always contended that each member of the proposed Class, just like Plaintiffs, has an interest in recovering losses suffered by the Plans as a result of the decline in VFGI's stock value. As such, Plaintiffs' interests in the lawsuit are the same as absent Class Members. Plaintiffs have also shown their ability and willingness to prosecute this action vigorously on behalf of the Class in the litigation to date, having responded to discovery, reviewed pleadings, and otherwise kept abreast of the litigation. *See* Volk Declaration, ¶ 17(l)-(m). Accordingly, Plaintiffs should be appointed class representatives under Rule 23(a)(4).

B. The Proposed Class Meets the Requirements of Rule 23(b)(1).

In addition to demonstrating that the requirements of Rule 23(a) are met, Plaintiffs must also establish that at least one subsection of Rule 23(b) is satisfied. Here, certification is proper under Rule 23(b)(1). Because of "the derivative nature of ERISA § 502(a)(2) claims, breach of fiduciary duty claims brought under § 502(a)(2) are paradigmatic examples of claims appropriate for certification as a Rule 23(b)(1) class, as numerous courts have held." *In re Schering Plough*, 589 F.3d at 604 (collecting cases).

While an ERISA class may be certified under Rule 23(b)(3), it is preferable to certify it under Rule 23(b)(1) because of the superior *res judicata* effect of the litigation with regard to

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claims of all class members. *See Green v. Occidental Petroleum Corp.*, 541 F.2d 1335, 1340 (9th Cir. 1976).

Under Rule 23(b)(1), a class may be certified if:

> (1) the prosecution of separate actions by or against individual members of the class would create a risk of
>
> > (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or
> >
> > (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests[.]

Thus, Rule 23(b)(1)(A) "considers possible prejudice to the defendants, while 23(b)(1)(B) looks to possible prejudice to the putative class members." *In re Ikon Office Solutions, Inc. Sec. Litig.*, 191 F.R.D. 457, 466 (E.D. Pa. 2000).

1. Rule 23(b)(1)(A)

Here, Rule 23(b)(1)(A) is satisfied for settlement purposes. This case has approximately 250 prospective Class Members. In the absence of class certification, there is potential for a large number of individual cases based on the same underlying facts, creating a high risk of inconsistent or varying adjudications that would establish incompatible standards of conduct. *Ikon*, 191 F.R.D. at 466 (finding a "risk of inconsistent dispositions that would prejudice the defendants: contradictory rulings as to whether Ikon had itself acted as a fiduciary, whether the individual defendants had, in this context, acted as fiduciaries, or whether the alleged misrepresentations were material would create difficulties in implementing such decisions"). Moreover, the claims Plaintiffs allege on behalf of the proposed Class are derived from core issues that are not individual in nature: whether Defendants were fiduciaries, whether Defendants breached their fiduciary duties, and whether Plaintiffs were harmed by Defendants' breaches. *See Jones v. NovaStar Fin. Inc.*, 257 F.R.D. 181, 194 (W.D. Mo. 2009) (finding that "central

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questions concerning whether the fiduciaries breached their duties to the Plan are not individual" matters).

2. Rule 23(b)(1)(B)

Rule 23(b)(1)(B) is also satisfied for settlement purposes. The Advisory Committee Note to Rule 23(b)(1)(B) emphasizes that this provision is particularly applicable where trust beneficiaries charge a breach of trust by a fiduciary:

> The same reasoning applies to an action which charges a breach of trust by an indenture trustee or other fiduciary similarly affecting the members of a larger class of security holders or other beneficiaries, and which requires an accounting or like measure to restore the subject of the trust.

Fed. R. Civ. P. 23(b)(1)(B) Advisory Committee Note (1966 Amendment); *see Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 834 (1999); *Church v. Consolidated Freightways, Inc.*, No. 90-2290, 1991 WL 284083, at *14 (N.D. Cal. Jun. 14, 1991) (invoking Advisory Committee note in certifying breach of fiduciary duty claim under (b)(1)(B)).

Here, were the Court to adjudicate Plaintiffs' claims that Defendants breached their fiduciary duties by imprudently investing the assets of the Plans, making misrepresentations, failing to disclose information, and failing to monitor co-fiduciaries, it would effectively dispose of the absent Class Members' claims. *See Syncor*, 227 F.R.D. at 346 (certifying a class under (b)(1)(B) and finding that "[i]f the primary relief is to the Plan as a whole, then adjudications with respect to individual members of the class would 'as a practical matter' alter the interests of other members of the class – if one plaintiff forces the Defendants to pay damages to the Plan, the benefit would affect everyone who has a right to disbursements from the Plan"). Rule 23(b)(1)(B), therefore, is a proper vehicle for certification of Plaintiffs' claims for settlement purposes.

C. Hagens Berman Should Be Appointed Counsel for the Class.

Rule 23(g) requires that courts consider the following four factors when appointing class counsel: whether counsel (1) has investigated the class claims, (2) is experienced in handling

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class actions and complex litigation, (3) is knowledgeable regarding the applicable law, and (4) will commit adequate resources to representing the class. *Morelock Enters., Inc. v. Weyerhauser Co.*, No. 04-583, 2004 WL 2997526, at *5 (D. Or. Dec. 16, 2004).

Hagens Berman meets the standards of Rule 23(g) because, as set forth in the declaration of counsel filed herewith, Hagens Berman has extensive experience litigating ERISA class actions and is knowledgeable regarding the applicable law. *See* Volk Declaration, ¶¶ 23-25. Hagens Berman has conducted extensive litigation and pre-settlement investigation of the proposed Class's claims, has committed significant resources to representing the proposed Class, and has demonstrated the ability to represent classes throughout complex litigation and to respond to the unique issues associated with representing employees in ERISA litigation. *See* Volk Declaration, ¶¶ 17, 23-24.

VII. CONCLUSION

For the reasons discussed above, the Settlement is a fair, adequate, and reasonable resolution of the claims against Defendants in this complex and contested ERISA class action. Thus, Plaintiffs respectfully ask the Court to grant their motion and to enter the proposed Preliminary Approval Order which: (1) grants preliminary approval of the proposed Settlement; (2) preliminarily certifies the class for settlement purposes; (3) approves the form and manner of the Notice; and (4) sets a date for a Fairness Hearing.

DATED: December 22, 2010.

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CERTIFICATE OF SERVICE

On December 22, 2010, I caused to be electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following attorneys of record:

- **Steve W. Berman**
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Executed this 22nd day of December, 2010, in Seattle, Washington.

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